IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 147 of 2006
With
COMPANY PETITION No. 148 of 2006
with
Company Application No. 572 of 2006
In
Company Petition No. 147 pf 2006
with
Company Application No. 573 of 2006
In
Company Petition No. 148 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NARMADA CHEMATUR PETROCHEMICALS LTD. - Petitioner(s)

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Appearance :
Mr. Saurabh Soparkar, with MRS SWATI SOPARKAR for Petitioners
MR YN RAVANI for Central Government.
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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH
Date : 09/1/2007

JUDGMENT

Company Petition No. 147 of 2006 is filed by the petitioner, Narmada Chematur Petrochemicals Limited [hereinafter referred to as 'Transferor Company'] for an appropriate order of sanctioning the Scheme of Arrangement in the nature of amalgamation with Gujarat Narmada Valley Fertilizers Company Limited [hereinafter referred to as 'Transferee Company'].

1.1. Company Petition No. 148 of 2006 is filed by the Transferee Company for sanctioning of the Scheme of Arrangement in the nature of amalgamation of Transferor Company with Transferee Company under Section 391 to 394 of the Companies Act, 1956. Company Applications No. 572 of 2006 and 573 of 2006 are filed in aforesaid Company Petitions by the applicants, i.e., Narmada Chematur Petrochemicals Limited Staff Union on behalf of employees of Transferor Company opposing

the aforesaid scheme of amalgamation of Transferor Company with Transferee Company.

2. It has been submitted on behalf of the Transferor Company that the Transferor Company is a listed Public Limited Company and was promoted as a joint venture between GNFC, the Transferee Company, Chematur Engineering AB of Sweden and its Indian Associates, IBI Chematur [Engineering & Consultancy] for the manufacture of TDI and Aniline. It is further submitted that amongst others, one of the reasons for incorporating the Transferor Company, as a separate company was to facilitate the Technical Collaborator, i.e., Chematur Engineering AB Sweden to participate in the project through equity investment. The Technical Collaborator for NCPL having divested its holding in NCPL and Chematur Group Directors on the Board of NCPL having thereafter resigned it has ceased to be a Joint Venture Company. It is

submitted that the Transferor Company is mainly engaged in the business of manufacturing and selling of chemicals and the turn-over of NCPL Transferor Company during the last financial year, i.e., 2004-2005 was Rs. 441.77 Crores and it has made net profit of Rs. 30.53 Crores. It has built up Reserves and Surplus of more than Rs. 109.28 Crores. GNFC, the Transferee company has an equity stake of 56.45% in the Transferor Company, i.e., NCPL and as such the Transferor Company NCPL is subsidiary company of Transferee Company. It has been further submitted that the present trend in corporate world is of consolidation, greater scale of operations, wider product base, global competitiveness leading to growth in top and bottom line. When GNFC the Transferee Company and NCPL, the Transferor Company are merged, the merged entity will be well poised to implement these concepts more effectively than the two company companies doing it separately. It is submitted that both the Transferor and Transferee

Companies belong to same group of management and the Transferee Company is a holding company for the Transferor Company. It has been further submitted that the Board of Directors of both the companies have thought it appropriate to amalgamate them for the purpose of achieving synergic advantages. It is thought fit to combine all the operations under one company and the same would make administration easy and control systems more efficient. The amalgamated company would have a larger market presence. It would be in a position to maximize its profits through optimum utilization of its resources and minimize the administrative and operative costs. The increased capital in case of the amalgamated company will strengthen its capital adequacy. Thus, the amalgamation would be to the mutual advantage of both the Transferor and Transferee Companies. It is further submitted that the Transferee Company has the core competence in the marketing and selling of industrial chemicals. Since the

Transferor Company NCPL is also engaged in manufacture and selling of industrial chemicals post merger synergies could be available and the merger will open up new avenues for product planning and product development as also effective marketing etc. It is further submitted that both the companies are located on the same campus and the complimentary strength of both the companies will enable the merged entity to visualize growth plans with a larger resources base and the marketing network of GNFC, the Transferee Company and its other strengths will now freely flow into the merged entity. The advantages of the merger of Transferor Company with Transferee Company are set out in Para 7.3. of the petition.

3. It is further submitted that Board of Directors of the Transferor Company resolved at the Board Meeting held on 28th February 2006, that subject to such approvals of shareholders, and subject to such sanctions of appropriate Courts,

as may be required in law, and subject to such consents and permissions of the Central Government and other authorities as may be necessary the Scheme of Amalgamation/Arrangement be made between the Transferor Company and the Transferee Company on the broad basis referred to in the Scheme of Amalgamation. It is further submitted that the learned Single Judge of this Court by order dated 1st May 2006 passed in Company Application No. 224 of 2006 [Annexure 'D' to the petition] directed the Transferor Company to convene separate meetings of the equity shareholders, secured creditors and unsecured creditors of the company for the purpose of considering and if thought fit approving with or without modifications in the said Scheme of Amalgamation. It is further submitted that on 29th June 2006, the said meetings of the equity shareholders, unsecured creditors and secured creditors of the company were duly convened in accordance with the aforesaid order passed by this Court and the result of the

meetings is also produced at Annexure 'E' to the petition.

3.1. It is submitted that out of 58 equity shareholders who attended the meeting, 2 ballots representing 220 shares were found to be invalid, and out of 56 valid votes cast representing Rs. 34,79,00,480/-, 55 votes representing Rs. 34, 78,98,480/- were found to be in favour of the proposed Scheme of Amalgamation whereas one vote cast representing Rs.2000/- was found against the proposed Scheme. Thus, the resolution approving the scheme is carried by requisite statutory majority of 98.21% in number and 99.999% in value.

3.2. It is further submitted that the meetings of secured creditors of the Transferor Company was attended by 3 creditors through their authorized persons and the total value of the debt is Rs. 4805.31 lacs. It is submitted that all the 3 secured creditors who attended the meeting voted

in favour of the proposed scheme of amalgamation and the resolution approving the scheme has been passed unanimously, i.e., 100% in number and 100% in value.

3.3. It is submitted that meeting of the unsecured creditors of the Transferor Company was attended by 23 unsecured creditors and the total value of their debt is Rs. 16,85,24,502, and the resolution approving the scheme is carried unanimously by the valid votes cast at the said meeting, and the decision of the Chairman of the meeting is in consonance with Rule 70 of the Company Court Rules, 1959. It is further submitted that in order to avoid any controversy at a future date about the correctness of the decision of the Chairman and the validity of the resolution, it was thought appropriate to abandon the result of the said meeting and to call a fresh meeting of only unsecured creditors of the Transferor Company to consider, and if thought fit

approve with or without modifications the said Scheme which was put before them at the meeting held on 29th June 2006 and an application being Company Application No. 387 of 2006 was therefore moved to seek necessary directions and seek additional time to file necessary petition after 21 days from the date of conclusion of the said meeting. The learned Single Judge of this Court, vide order dated 21st July 2006 [Annexure 'F'] permitted the petitioner to abandon the outcome of the meeting of the unsecured creditors convened on 29th June 2006 and directed the petitioner company to convene a fresh meeting of only unsecured creditors of the Company on 19th August 2006, and accordingly a fresh meeting of the unsecured creditors was convened on 19th August 2006 and the said meeting of the unsecured creditors of the Company was attended by 68 unsecured creditors; the total value of their debt is Rs. 17,36,53,809; and all the unsecured creditors present for voting at the meeting voted in favour of the resolution

approving the proposed scheme. Hence, the resolution approving the proposed scheme has been carried unanimously, i.e., 100% in number and Rs. 100 in value.

3.4. Since the proposed Scheme of Amalgamation has been duly approved by the requisite majority of the equity shareholders, secured creditors and unsecured creditors present at the meetings duly convened and held as per the directions of this Court, the petitioner company has preferred the present company petition for sanction of the Scheme of Arrangement in the nature of Amalgamation.

4. Company Petition No. 148 of 2006 is filed by Transferee Company, for sanction of amalgamation of Transferee Company with the Transferor Company. It is submitted that the Transferee Company is a listed Public Limited Company and the company is mainly engaged in the

business of manufacturing and selling of fertilizers and chemicals as also in the business of Information Technology related service. The Turnover of the Company during the last financial year, i.e., 2004-2005 was Rs. 1935.53 Crores and it had made net profit of Rs. 224.02 crores. It is further submitted that it has built up Reserves of Rs. 807.07 Crores. It is submitted that the Transferee Company has equity stake of 56.45% in the Transferor Company, i.e., NCPL, and as such the Transferor Company is the subsidiary company of the Transferee Company within the meaning of Section 4 of the Companies Act, 1956. By making the same submissions which are made by the Transferor Company for the proposed Scheme of Amalgamation/Arrangement, it has been emphasized that both the Transferor and Transferee Companies belong to the same group of management and therefore the Board of Directors of both the Companies have thought it appropriate to amalgamate them for the purpose of achieving

synergic advantages. It is further submitted that amalgamation would be to the mutual advantage of both the Transferor and Transferee Companies. The advantages due to amalgamation/arrangement have been enumerated in Para 7.3 of the Company Petition.

4.1. It is submitted that the Board of Directors of the Transferee Company resolved at the Board Meeting held on 28th February 2006 that subject to such approvals of shareholders, and subject to such sanction of appropriate courts as may be required in law, and subject to such consents and permissions of the Central Government and other authorities as may be necessary the Scheme of Amalgamation/Arrangement should be made between the Transferor Company and the Transferee Company on the broad basis referred to in the Scheme of Amalgamation.

5. It is further submitted that pursuant to the order passed by the learned Single Judge of

this Court dated 1st May 2006 in Company Application No. 223 of 2006, the Transferee Company was directed to convene the meeting of equity shareholders for the purpose of considering and if thought fit approving with or without modifications in the said Scheme of Arrangement, and accordingly on 29th June 2006 the meeting of equity shareholders of the Transferee Company was duly convened in accordance with the said order and the Chairman of the said meeting has reported about the result of the said meeting to this Court by Affidavit dated 8th July 2006 [Annexure 'E']. It is further submitted that out of 152 shareholders representing 6,48,06,448 shares of Rs. 10/- each present for voting at the meeting, 125 votes representing the value of Rs. 64,80,27,140/- being 6,48,02,714 shares of Rs.10/- each were found in favour of the Scheme and 4 votes representing value of Rs. 9000 being 900 shares of Rs. 10/- each were found against the scheme. It is submitted that the resolution

approving the scheme has been carried by requisite statutory majority of 96.899% in number and 99.999% in value.

6. Since the proposed Scheme of Amalgamation/Arrangement has been duly approved by requisite majority of equity shareholders at the meeting duly convened and held as per the directions of this Court, the Transferee Company has preferred the Company Petition No. 148 of 2006 to approve the proposed Scheme of Amalgamation/Arrangement under the provisions of the Companies Act, 1956.

7. As stated above, Company Application No. 572 of 2006 and Company Application No. 573 of 2006 are filed by Narmada Chematur Petrochemicals Limited Staff Union opposing the Scheme of Arrangement/Amalgamation of Transferor Company with Transferee Company and has requested not to sanction the said Scheme.

8. Heard Shri Saurabh N. Soparkar, learned Senior Advocate appearing with Mrs. Swati Soparkar, learned advocate appearing on behalf of the respective petitioners and Shri Shalin N. Mehta, learned advocate appearing on behalf of the Employees Union of Transferor Company. Before considering the rival submissions made on behalf of the respective parties, the objections raised by the Staff Union are required to be referred to, dealt with and considered. Following objections are raised on behalf of the Staff Union of NCPL opposing the proposed Scheme of Amalgamation;

(1) Important issues concerning service conditions of employees of NCPL [Transferor Company] ought to have been considered and dealt with while proposing the scheme of amalgamation of Transferor Company with Transferee Company.

(2) The proposed Scheme of Amalgamation is not in the interests of employees and it is prejudicial to the interests of NCPL [Transferor Company].

(3) The scheme is prejudicial to public policy as the profit making Transferor Company is to be merged and/or amalgamated with the Transferee Company.

(4) The issues with regard to employees of the Transferee Company are not dealt with and considered by the companies in support of their objection with regard to non-dealing of important issues concerning the service conditions of the employees of NCPL [Transferor Company].

The following submissions are made in support of the above objections;

"(A) On amalgamation/merger of NCPL with GNFC, and the employees of GNFC on their absorption in GNFC, parity is required to be maintained between the employees of the erstwhile NCPL and the employees of the GNFC. This is required to be stated because the preamalgamation/merger scenario is that there is a wide difference between the wages/salary payable to the employees of NCPL and wages/salary payable to the employees of GNFC for the same grade or class. An employee of GNFC earns more by way of wages/salary 30% more than what an employee of NCPL would earn for equivalent grade or class. On absorption of NCPL employees in GNFC in the post-amalgamation/merger scenario, this parity between the two groups is required to be abolished. Moreover the pay-revision of GNFC employees is due from 01.07.2006 and on finalization of the same the wage difference will again increase from 30% to that negotiated %.

(B) On amalgamation of NCPL with GNFC, NCPL will cease to be an independent entity for all purpose. By this measure, all employees of the erstwhile NCPL would

necessarily become the employees of GNFC on their absorption in GNFC in the post-amalgamation/merger scenario. Thus, after absorption in GNFC, for eg. Grade S3 or S4 employee of the erstwhile NCPL, on his/her absorption in GNFC should be in grade S3 or S4 employee of GNFC in the post-amalgamation/merger scenario.

(C) The absorption of the employees of the erstwhile NCPL in GNFC in the post-amalgamation/merger scenario, ought to be effected in such a manner that no loss in seniority is caused to the concerned employees of the erstwhile NCPL on their absorption in GNFC in the post-amalgamation merger scenario."

9. Shri Shalin Mehta, learned advocate appearing on behalf of the Staff Union of Transferor Company has submitted that after amalgamation of Transferor Company with Transferee Company, the Transferor Company will not be in existence and all the employees of the Transferor Company will be of the employees of GNFC, the

Transferee Company and there will be a difference in the pay-scale and other benefits of the Transferee Company, the employees of the Transferee Company will be paid more salary in accordance with the pay-scale and other benefits being paid to the employees of NCPL though they will be treated as employees of GNFC after the amalgamation. It is submitted that the dispute with regard to seniority, fitment, and pay parity with the employees of original Transferee Company would arise and such issues have not been taken into account by the companies while proposing the Scheme of Amalgamation. It is further submitted by him that the scheme is against the public policy as the profit making Transferor Company would be merged with another profit making company and one profit making company is not required to be amalgamated with another profit making company. He has submitted that one can appreciate if a loss making Company proposes for its amalgamation with a profit making company.

10. Meeting with the preliminary objections raised on behalf of the petitioner company that the Workers Union has no locus to challenge or oppose the scheme of amalgamation, Shri Mehta, learned advocate on behalf of the Workers Union has submitted that such standing can be found in Section 394(1)(v) of the Companies Act, 1956. Relying upon Section 394(1)(v) of the Act, Shri Mehta has submitted that the words “for any persons who” are wide enough to include the employees of the Transferor Company. There is nothing in Section 394(1)(v) to suggest that the words “for any persons who” are restricted to members and creditors only of the company. It is submitted by him that the words employed in the first part of Section 394(1) “and any such persons as are mentioned in that section (Section 391)” cannot be said to control the words “the provision to be made for any persons who dissent from the compromise or arrangement” used in the latter part

of Section 394(1). According to him, the additional words “as are mentioned in that Section” used in the first part of Section 394(1) are not used in the latter part of Section 394(1), as a result of which it cannot be said that clause (v) of Section 394(1) restricts the meaning of the words “for any persons” to members and creditors of company only. In support of his above submission that employees or workers of the Transferor Company can challenge or raise objections to a Scheme of Amalgamation, he has relied upon the following Judgments;

(1) (2000) 1 COMPANY LAW JOURNAL 351 (BOMBAY), at 371 [Para 66];

(2) (1995) 83 COMPANY CASES 30 (SC) at Page 64;

(3) (1990) 1 COMPANY LAW JOURNAL 285 (DELHI) at 289 (Para 30);

(4) (2006) 134 COMPANY CASES 99 (Madras)

at 102 (Para 10).

11. Shri Mehta, learned advocate appearing on behalf of employees of the Transferor Company has submitted that the proposed Scheme of Amalgamation is prejudicial to the employees of the Transferor Company inasmuch as the proposed scheme does not deal with various issues of parity, fitment, seniority and placement vis-a-vis, new recruits of the Transferee Company. Clause 12 of the proposed scheme does nothing at all to prevent the future discrimination against the employees of the Transferor Company. According to the employees, Clause 12 gives a carte blanche to the management of the Transferee Company by paying them less than the employees of the Transferor Company even after two entities become one and the employees of the Transferor Company become the employees of the Transferee Company. In Clause 12 of the proposed Scheme, the management of the Transferee Company would be able

to retain two separate streams or systems in one organization by discriminating between the employees of the Transferor Company and the employees of the Transferee Company. It is further submitted that the companies have never applied their mind to the issues which have been raised by the employees of the Transferor Company. It is submitted that as the companies have openly admitted that they would like to maintain disparity between the employees of the Transferor Company and the employees of the Transferee Company the proposed scheme is highly prejudicial to the employees of the Transferor Company.

12. It is further submitted by the learned advocate appearing on behalf of the Employees Union that the proposed Scheme of Amalgamation is against public policy/interest. It is submitted that both the Companies are profit making entities. It is submitted that the books of accounts of the Transferee Company clearly reveal

that additional annual burden that would fall on GNFC were to accept the principle of parity between the employees of the Transferee Company and the employees of the Transferor Company can be easily swallowed and absorbed by the Transferee Company. The additional burden works out to be a sum of Rs. 4 Crores annually and the said amount is petty when compared with the profit made by the Transferee Company which is more than Rs. 100 crores. It is averred that by the proposed amalgamation the shareholders of the Transferee Company and the Transferor Company would be benefitted and if the merged entity makes higher profits, obviously the employees of the Transferee Company would stand to benefit, however the proposed scheme does not intend that the employees of the Transferor Company benefit from the better profit expectation that the amalgamation would result in. Relying upon the decision of the Hon'ble Supreme Court in the case of **NATIONAL TEXTILE WORKERS'UNION VS. P.R. RAMAKRISHNAN (AIR**

1983 SC 75), it is submitted by Shri Mehta that the workers/employees occupy very important place in the modern Corporation of today and if the scheme is highly prejudicial to the employees of the Transferor Company it cannot be said that the same is in public interest.

13. Relying upon decision of the Hon'ble Supreme Court in the case of **MIHEER H. MAFATLAL Vs. MAFATLAL INDUSTRIES LTD., (1997) 1 SCC 579 at Page 596,** it is submitted by Shri Mehta that the litmus test for upholding or sanctioning a Scheme of Amalgamation when such a Scheme is viewed against the objections raised by the employees of the Transferor Company, is not whether the employees of the Transferor Company would be worse after amalgamation. According to him, the litmus test is whether the scheme is fair, just and reasonable to all concerned, which would include the employees of the Transferee Company and the burden to establish this is on the companies. It

is submitted that, in the present case as the proposed scheme is not just, fair and reasonable to the employees of the Transferee Company, the scheme does not pass muster of the test laid down in the case of ***Miheer H. Mafatlal (supra).***

14. It is further submitted by Shri Mehta that the decision of this Court relied upon by the petitioners in the case between **GUJARAT NYLONS LTD AND GUJARAT STATE FERTILIZERS COMPANY LTD., (1992) 1 GLH 637** to contend that the service conditions of the employees of the Transferor Company do not strictly fall within the purview of the Scheme of Amalgamation, is impliedly overruled by the decision of the Hon'ble Supreme Court in the case of **HINDUSTAN LEVER EMPLOYEES UNION Vs. HINDUSTAN LEVER LTD., 1983 COMPANY CASES 30,** wherein the Hon'ble Supreme Court has examined and considered the challenge of the employees' union to the Scheme of Amalgamation. It is submitted that the Hon'ble Supreme Court, after examining

the Scheme of Amalgamation, and more particularly the provisions concerning the employees of both the Companies, came to the conclusion that the Scheme had fully safeguarded the interest of the employees and their service conditions had not been prejudicially affected by the reason of the Scheme. Meeting with the submission on behalf of the petitioners that if at all it is found that there is disparity created between the employees of the Transferor Company and the Transferee Company by the proposed Scheme of Amalgamation the same can be challenged before an appropriate forum in accordance with law, Shri Mehta has submitted that merely because the employees of the Transferee Company have a right to challenge the disparity created between them and the employees of the Transferee Company, the same cannot divest the jurisdiction of the Company Court under Section 394(1) to consider their objections to the proposed Scheme on its merits. Making the above submissions and raising the abovesaid objections,

it is requested not to sanction the proposed Scheme of Amalgamation of Transferor Company with the Transferee Company as the same would be prejudicial to the interests of the employees of the Transferor Company.

15. Shri SN Soparkar, learned Senior Advocate appearing on behalf of the petitioners has vehemently submitted that the applications submitted by the workers union are not maintainable and the employees have no right to object to the scheme of amalgamation. He has further submitted that even otherwise assuming that the views of the employees are required to be considered in that case also and on merits also the objections submitted for and on behalf of the employees of NCPL the Transferor Company are not sustainable having no substance. It is further submitted by him that Clause 12 of the Scheme clearly provides that all the employees of the Transferor Company in service on the effective

date shall become employees of the Transferee Company and on such date “as they were in continuous service without any break or interruption in service and on the terms and conditions as to remuneration not less favourable than those subsisting with reference to the transferor company on the said date”. So, the scheme protects the employees of Transferee Company by clearly providing that post merger they would continue to have,

(i) continuity of service;

(ii) terms and conditions as to remuneration not less favourable than those subsisting today.

16. It is submitted that it is not possible to treat the employees of Transferor Company at par with employees of Transferee Company. The Transferee Company was incorporated in May 1976 whereas the NCPL the Transferor Company was incorporated in September 1992 and during the

period of 29 years of its existence the Transferee Company has achieved excellence in production and marketing of fertilizers and industrial chemicals. With the growth of company,the pay and perks and remuneration of GNFC employees have been increased during the said period. NCPL, the Transferor Company being incorporated only in September 1992 and started making continuous profits only from financial year 2000-2001, it is quite natural that there has been difference in pay and perks and remuneration of employees of NCPL compared to that of employees of GNFC which generates profit right from the first year of its commercial operations. Accordingly, the pay-scale, perks and benefits available to the GNFC and NCPL employees are different right from inception of NCPL. It is further submitted that as per Clause 12, there will be no break or interruption in the service of employees of NCPL and hence there will

not be any adverse effect in seniority of the NCPL employees.

17. It is further submitted by Shri Soparkar that as stated above the objector has no locus standi at all to the objections of the nature raised. The scheme of amalgamation is offered by the petitioners to their respective shareholders and creditors; Section 391 envisages compromise with them only. The objector is neither a shareholder nor a creditor. It has therefore no right to object to the scheme. The employees can only point out to the Court if the scheme is going to work to the prejudice of the employees of NCPL and if the scheme does not prejudice the employees of NCPL, no further inquiry is necessary. It is submitted that there is a distinction between “prejudice” and “refusal to give benefit”. A person can be said to be prejudiced or adversely affected only when his present position indicates a change, his present position does not undergo a change and if remains static there is no prejudice, and it may be a case of not getting the

benefit. Shri Soparkar, relied upon the decision of the Division Bench in the case of **JITENDRA SUKHADIA Vs. ALEMBIC CHEMICAL WORKS LIMITED, (1964, COMPANY CASES 206)**in support of his submission that the workers union has no locus standi. According to Shri Soparkar, this Court in the decision of ***Gujarat Nylon Company Ltd [supra]*** has held that the fact that post merger employees of erstwhile Transferor Company may not be treated alike with employees of Transferee Company and that such a disparity cannot be a ground which can be raised in opposition of scheme of amalgamation. According to him, this Court has clearly held that such an issue would not fall within the realm of Sections 391-394 of the Act.

18. He has further submitted that even the said issue is also covered by the judgment of the Hon'ble Supreme Court in the case of ***Hindustan Lever Employees Union Vs. Hindustan Lever Limited [supra].*** It is submitted that the very argument

was canvassed before the Hon'ble Supreme Court that inasmuch as post merger the employees of two companies would be treated differently the scheme should not be sanctioned. The Hon'ble Supreme Court specifically rejected that argument by holding that so long as the employees of the respective companies do not, post merger, suffer any change to their detriment, the sanction of the scheme cannot be refused. It is submitted by him that it is clearly held by the Hon'ble Supreme Court that (a) post-merger it is not necessary that the employees of two companies must be treated alike and (b) even if the scheme does not provide for such equality sanction cannot be refused.

19. It is further submitted by Shri Soparkar that merely because under the scheme the Transferee Company does not undertake to equalize the terms of remuneration of both the companies the same cannot be said to be contrary to public

interest. There is no obligation in law cast upon the transferee company to equalize such terms.

20. Meeting with the submission by the learned advocate appearing on behalf of the objectors that this Court has power to make necessary provision for the benefits of employees of NCPL under Section 394(1)(v), Shri Soparkar has submitted that under Section 394(1)(v), this Court has power to make provision in respect of “person” “dissenting” from the scheme and the question of dissent will arise only if consent is sought. In a scheme consent of only shareholders and creditors is sought, and therefore “persons” referred to under Section 394(1)(v) would necessarily mean only shareholders and creditors.

21. So far as disparity of two companies or two divisions, post merger is concerned, Shri Soparkar has submitted that the same cannot be a question to be adjudicated in the scheme

proceedings and that this Court is not required to embark upon the said issue. If post merger the employees of erstwhile NCPL believe that they are not treated appropriately then they can always raise necessary disputes under Labour Laws which could be adjudicated upon by appropriate forum after taking appropriate evidence and after hearing all parties in accordance with law. It is submitted that on the basis of mere assertion and allegation without any documentary proof and without any evidence whatsoever it would neither be appropriate nor necessary to opine on the said issue, much less adjudicate the said issue because any observation of this Court one way or the other would affect the outcome of the proceedings which may be taken by one or more parties at a future date. It is, therefore, requested to overrule the objections raised by the employees of the Transferor Company.

22. It is submitted by Shri Soparkar that the

proposed scheme of amalgamation has been approved by the shareholders, secured creditors and unsecured creditors of the Transferor Company, and by the shareholders of the Transferee Company by statutory majority; the Central Government has submitted that they have no objection if the proposed scheme of amalgamation is sanctioned; and the Official Liquidator has submitted his Report in favour of the scheme, and therefore it is requested to allow both the petitions and sanction the scheme of amalgamation

of Transferor Company with the Transferee Company.

23. Heard the learned advocates appearing on behalf of the respective parties. By the proposed scheme of amalgamation, Transferor Company, i.e., NCPL is sought to be amalgamated with Transferee Company, i.e., GNFC. The proposed scheme of amalgamation has been approved by the shareholders, creditors and unsecured creditors of

the Transferor Company by statutory majority. Similarly, the proposed scheme of amalgamation has also been approved by the equity shareholders of the Transferee Company by requisite statutory majority. The Official Liquidator attached to this Court has submitted his Report dated 26th September 2006 that pursuant to the order passed by this Court, a Chartered Accountant was appointed for the purpose of scrutiny/investigation of the affairs of the company and the Chartered Accountant has submitted his report that the accounts and transactions of the company were prima facie conducted within the objects mentioned in the Memorandum of Association of the Company and that the affairs of the Company have not been conducted in a manner prejudicial to the interests of the members or to public interest.

23.1. Assistant Registrar of Companies, in the Office of ROC, Gujarat, has filed his Affidavit

along with the Central Government's Report sent to the Registrar of Companies, dated 9.10.2006, and as per the communication of the Regional Director dated 9th October 2006, the Central Government has examined the report on these Company Petitions and after due examination it is decided not to oppose the present petitions, meaning thereby that the Central Government has no objection if the proposed scheme of arrangement/amalgamation is sanctioned as per the prayers in both the company petitions.

24. The main objection on behalf of the employees of the Transferor Company, i.e., NCPL is that the proposed scheme is prejudicial to the employees of the Transferor Company inasmuch as the employees of Transferor Company would not be put at par with the employees of the Transferee Company and they will be paid lesser salaries/pay-scales than the employees of the Transferee Company, and that there will not be parity, fitment and seniority and placement vis-a-vis new

recruits of the Transferee Company. It is also the contention on behalf of the employees of the Transferor Company that while submitting the scheme the aforesaid issues have not been considered and dealt with by the companies and therefore necessary directions should be issued to amend the scheme and to make necessary provision so as to have parity in the pay-scale, seniority etc., and put the employees of Transferor Company at par with the employees of Transferee Company for all purposes, by exercising the powers under Section 394 of the Companies Act. It is also the contention on behalf of the Employees Union of the Transferor Company that they have *locus standi* to object to the scheme of amalgamation and for that purpose they have relied upon the judgment of the Delhi High Court in the case of **MOHTA INVESTMENTS (P) LTD.,** reported in **(1990) 1 COMP. LJ. 285(Del.)**; decision of the Bombay High Court in the case of **KEC INTERNATIONAL LIMITED Vs. KAMANI EMPLOYEES UNION AND OTHERS,** reported in **(2000) 1**

COMP.LJ 351 (Bom.); and decision of the Hon'ble Supreme Court in the case of ***Hindustan Lever Employees Union Vs. Hindustan Lever Limited [supra].***

25. Though the learned counsel appearing on behalf of the petitioner companies has raised an objection with regard to locus of the Employees Union, he has submitted that even assuming that the employees have some locus and can object to the scheme, in that case also it should be restricted while submitting views and make submissions whether the scheme is prejudicial to the interests of the employees or not. Even otherwise, considering the judgments of the Delhi High Court as well as of the Bombay High Court, it cannot be said that the employees have no locus at all to object to the scheme of amalgamation. Even in the case of ***Hindustan Lever Employees Union Vs. Hindustan Lever Limited [supra],*** the Hon'ble Supreme Court considered the objections on behalf

of the employees of the companies. Now, so far as the decision relied upon by the learned counsel appearing on behalf of the companies in the case of ***Gujarat Nylon Company Ltd [supra]*** is concerned, it is required to be noted that, in the said case it was the contention on behalf of the Employees Union that before an action of proposed amalgamation a meeting of the workers of the Transferor Company must be held and they have right to object to proposed scheme of amalgamation, and since such meeting is not held all the actions taken by the company can be said to be illegal and contrary to law. While dealing with such contention, the learned Single Judge of this Court has negatived the same. However, the learned Judge has considered the submissions on behalf of the Workers Union on merits and their objections have been considered. Under the circumstances, it cannot be said that the employees of the Transferor Company have no locus to express their views. Accordingly it is held

that employees of Amalgamating Company have locus standi to object to the Scheme of Amalgamation if it is found to be prejudicial to their interests and therefore their objections are considered and dealt with by this Court on merits.

26. So far as the objections raised by the employees of the Transferor Company to the effect that while proposing the scheme of amalgamation the issues with regard to parity in pay-scales, seniority etc., of the employees of the Transferor Company have not been considered and dealt with and that the employees of the Transferee Company will be paid more salary and pay-scales than the employees of the Transferor Company though after the amalgamation the employees of the Transferor Company will be treated to be employees of the Transferee Company also, are concerned, on going through the affidavit-in-reply to the Company Application, more particularly, Paragraphs 7(c) and 8(a) to 8(h) thereof, it appears that the

objections have in fact been considered by the Companies and some of them are even favourably considered.

27. Clause 12 of the Scheme reads as under;

> ***"All the employees of the Transferor Company in service on the Effective Date, shall become the employees of the Transferee Company on such date as if they were in continuous service without any break or interruption in service and on the terms and conditions as to remuneration not less favourable than those subsisting with reference to the Transferor Company as on the said date."***

As stated above, Clause 12 of the Scheme clearly

provides that all the employees of NCPL, the Transferor Company in service on the effective date, ***"shall become the employees of the Transferee Company on such date as if they were in continuous service without any break or interruption in service and on the terms and conditions as to remuneration not less favourable than those subsisting with reference to the Transferor Company as on the said date."*** Thus, the Scheme protects the employees of NCPL [Transferor Company] by clearly providing that post merger they would continue to have (i) continuity of service; and (ii) terms and conditions as to remuneration not less favourable than those subsisting today. This Court, at present, is not expressing any opinion on the question whether there is any justifiable reason for different pay-scales of the employees of the Transferor Company and the employees of the Transferee Company after the amalgamation. As held by the Hon'ble Supreme Court in the case of

Hindustan Lever Employees Union Vs. Hindustan Lever Limited [supra], so long as the employees of respective companies do not, post merger, suffer any change to their detriment, the sanction of the scheme cannot be refused. The Hon'ble Supreme Court, in the said decision, has observed as under;

> ***"Next it was argued on behalf of the employees of TOMCO that the scheme will adversely affect them. This argument is not understandable. The scheme has fully safeguarded the interest of the employees by providing that the terms and conditions of their service will be continuous and uninterrupted and their service conditions will not be prejudicially affected by reason of the scheme. The grievance made,***

however, is that there is no job security of the workers, after the amalgamation of the two companies. It has been argued that there should have been a clause in the scheme ensuring that no retrenchment will be effected after the amalgamation of the two companies. There was no assurance on behalf of the TOMCO that the workers will never be retrenched. In fact, the performance of TOMCO over the last three years was alarming for the workers. It cannot be said that after the amalgamation they will be in a worse position than they were before the amalgamation.

We do not find that the amalgamation has caused any

prejudice to the workers of TOMCO. The stand of the employees of HLL is equally incomprehensible. It has been stated that if the TOMCO employees continue to enjoy the terms and conditions of their service as before, then two classes of employees will come into existence. The terms and conditions of HLL employees were much worse than those of TOMCO employees. If there are two sets of terms and conditions under the same company, then a case of discrimination will arise against the HLL employees.

We do not find any substance in this contention. The TOMCO employees will continue to remain on the same terms and conditions as

before. Because of this arrangement, it cannot be said that prejudice has been caused to HLL employees. They will still be getting that they were getting earlier. TOMCO employees who were working under better terms and conditions, will continue to enjoy their old service conditions under the new management.

Fear has been expressed both by TOMCO employees as well as HLL employees that the results of the amalgamation would necessitate streamlining of the operations of the enlarged company and the workers will be prejudiced by it.

No one can envisage what will happen in the long run. But on this hypothetical question, the

scheme cannot be rejected. As of now, it has not been shown how the workers are prejudiced by the scheme."

Thus, the Hon'ble Supreme Court, considering the very arguments/objections raised by the employees of the Transferor Company at present, has held that if the service conditions of the employees of the Transferor Company will continue to remain on the same terms and conditions as before and merely because the employees of the Transferor Company and/or Transferee Company as the case may be will get more salary, it cannot be said that prejudice will be caused as they will still be getting what they were getting earlier. In the case before the Hon'ble Supreme Court, the employees of the Transferor Company were working under better terms and conditions and an objection was raised by the employees of the Transferee Company that they will be getting less

salary than the employees of the Transferor Company after amalgamation, and dealing with the same, the Hon'ble Supreme Court has observed as above. Under the circumstances, the objections raised on behalf of the employees of the Transferor Company cannot be sustained and are hereby overruled.

28. In the case of ***Gujarat Nylon Company Ltd [supra]***, the learned Single Judge of this Court has also considered the very argument which has been made on behalf of the employees of the Transferor Company in the present case that after the amalgamation of the Transferor Company with the Transferee Company the workmen of the Transferor Company are deemed to be workers of Transferee Company and all the workmen can be said to be employees of one company and therefore they cannot be treated unequally and there should

not be any discrimination between the workers similarly situated, and considering the above argument and relying upon the decision of the Hon'ble Supreme Court in the case of ***Union of India Vs. Alembic Sarabhai Enterprise,53 Company Cases 206,*** and decision of the Karnataka High Court in the case of ***Mysore Electrical Works Ltd. Vs. I.T.O., Bangalore,*** *reported in* ***52 Company Cases 32,*** and considering the jurisdiction of the Company Court while considering the scheme of amalgamation this Court has held that when the Company Court exercises jurisdiction under the Act, it has to decide the matter in accordance with the provisions of that Act. The learned Single Judge has observed as under;

> ***"36. Mr. Zaveri further contended that if there is amalgamation of transferor Company with the Transferee Company and if the workmen of the transferor Company are deemed to be***

workers of the transferee Company with effect from a particular date, all the workmen can be said to be only of one company, i.e. Transferee Company from that date. They cannot, therefore, be treated unequally, and there should not be any discrimination between the workers similarly situated. Mr. Raval, on the other hand, has submitted that this is not a question which can be agitated, dealt with or decided in the present proceedings by the company court. In amalgamation proceedings, interests of the workmen are required to be protected at the time of amalgamation as held by Division Bench of this Court in Jitendra Sukhadia v. Alembic Chemical Works Co.reported in 64 Company Cases 206. He also submitted that the classification can always be made on the basis of geographical situation of the Unit, educational qualifications of the

workmen, nature of work to be performed by the employees, and the like. The Company Judge in the exercise of powers under Sections 391 and 394 of the Act is not concerned with all these matters. It is always open to the workers of the Company if they feel aggrieved by any action of the Company to raise a demand, dispute or claim in an appropriate proceeding. On the ground of potential liability, sanction cannot be refused. In this connection, Mr. Raval drew my attention to the decision of the Supreme Court in the case of Union of India v. Alembic Sarabhai Enterprise, reported in 55 Company Cases 623 and of the Karnataka High Court in the case of Mysore Electrical Works Ltd. v. I.T.O., Bangalore, reported in 52 Company Cases 32. In the latter case, it was specifically held by the High Court of Karnataka that the direction by the

Company Court cannot relate to matters outside the scheme and obviously it is so. When the Company Court exercises jurisdiction under the Act, it has to decide the matter in accordance with the provisions of that Act. It is neither deciding any question nor expressing any opinion on the points which do not strictly fall within the purview of the Scheme of amalgamation. Therefore, if the employees of the transferee Company feel aggrieved in connection with payment of wages or other conditions of service, it is always open to them to approach an appropriate forum in accordance with law and all those questions will be decided in those proceedings. Granting of sanction of amalgamation of companies by this court would not come in the way of workmen, while deciding the question which may be raised in those proceedings. Even though this legal position is abundantly

clear, Mr. Raval stated that if the employees of the transferee company feel aggrieved, they can approach an appropriate forum if so advised and those proceedings will be disposed of in accordance with law by appropriate authorities under the relevant statutes."

Thus, considering the decision of this Court in the case of *Gujarat Nylons Ltd.,[supra],* if there is any disparity of the pay-scales of employees of two companies or two divisions, post merger, it will be open for the employees of the erstwhile NCPL to raise industrial dispute under the Labour Laws before the appropriate forum which can be adjudicated by the appropriate forum after taking appropriate evidence and after hearing all the parties in accordance with law.

29. So far as the objection raised on behalf of Employees Union that there are defects in the

affidavit sworn in Company Petition and the same is not in accordance with Rule 21 of the Company Court Rules read with Form No. 3 is concerned, considering the Judgment of the Hon'ble Supreme Court in the case of **ASSOCIATED JOURNALS LIMITED Vs. MYSORE PAPER MILLS LTD., (2006) 6 SCC 197**, it cannot be said that there is any defect in the affidavit. As observed and held by the Hon'ble Supreme Court in Paragraphs 20 to 22, if in the affidavit and verification it is stated that knowledge, information and belief, the same can be said to be a substantial compliance. Under the circumstances, the said objection on behalf of the Workers Union is also overruled.

30. It is the contention on behalf of the objector Employees Union of the NCPL that the proposed scheme of amalgamation is against public policy because one profit making company would merge into another profit making company.

30.1. As already stated above, almost all the shareholders and all the creditors of both the companies have approved the Scheme of Amalgamation. In the case of **EMPLOYEES UNION Vs. HINDUSTAN LEVER LTD., AIR 1995 SC 470,** the Hon'ble Supreme Court has laid down eight parameters for granting sanction under Sections 391 and 394 of the Companies Act, 1956. Most of the parameters provide for compliance with the requisite statutory procedures including approval of the requisite majority of the members and creditors of the companies in question and also for ensuring that the members and creditors act bona fide and are not coercing the minority. Parameter No.5 requires that the requisite material contemplated by the Proviso to Section 391(2) should be placed before the Court to the satisfaction of the Court. Parameter No.6 is formulated as under;

"6. That the proposed

> ***scheme of compromise and arrangement is not found to be violative of any provisions of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judicially x-ray the same."***

After laying down the aforesaid broad paramters the Apex Court laid down the following principle:

> **"Once the aforesaid parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme**

> **even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground, as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."**

The Hon'ble Supreme Court has further amplified the above principle in the case of ***Miheer H. Mafatlal vs. Mafatlal Industries Ltd [supra]*** (***1997) 1 SCC 579 = 87 Company Cases 792*** as under;

> ***"It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the***

> ***Court. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the requisite majority. Consequently the company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire."***

Now considering the above, merely because one profit-making company would merge into another profit-making company, it cannot be said that the same is against the public policy as contended on behalf of the objector. It is the commercial corporate decision taken by the parties to the scheme who have taken uniform decision about the usefulness and propriety of the scheme by

supporting it by requisite majority vote.

31. The scheme has detailed the benefits which it will bring to both the companies under the same management on account of amalgamation of both the companies including the minimisation of the administration, marketing and operative costs which would increase the profitability of the company which would also result into economies of scale and integrated operations, resulting in efficiencies in production and marketing. Thus, it is submitted that amalgamation would be to the mutual advantage of both Transferor and Transferee Companies. It is further submitted that complimentary strength of both the Companies will enable the merged entity to visualize growth plans with larger resources base of the marketing network of GNFC Transferee Company and its other strengths will now freely flow into the merged entity. Almost all the shareholders as well as all the creditors of both the companies have

approved the Scheme of Amalgamation and there is no objection from any of the shareholders or any of the creditors, to the Scheme of Amalgamation despite advertisement of the public notices of these petitions in two daily newspapers, i.e., 'Indian Express' and 'Sandesh' which have the largest circulation in the State. The objections raised by the Employees Union of Transferor Company have already been considered hereinabove. There is no reason for disapproving the Scheme of Amalgamation on account of those objections. The Scheme of Amalgamation does not appear to be contrary to the law or contrary to public interest. As stated above, the Central Government has submitted their No Objection as well as the Official Liquidator attached to this Court has also submitted his Report and no objection has been raised by the Official Liquidator. Hence, there does not appear to be any impediment to granting sanction to the Scheme of Amalgamation as proposed.

32. For the reasons stated above, both the petitions, namely Company Petition No. 147 of 2006 and Company Petition No. 148 of 2006 are allowed. Prayers in terms of paragraph 28(a) of the Company Petition No. 147 of 2006 and 21(a) of the Company Petition No. 148 of 2006 are hereby granted. Company Applications No. 572 of 2006 and 573 of 2006 are hereby dismissed.

33. So far as costs to be paid to the learned Additional Central Government Standing Counsel is concerned,, the same is quantified at Rs. 3500 per petition and the same may be paid to Shri Y.N. Ravani,learned Central Government Standing Counsel by the respective petitioners.

[M.R. Shah, J.]

RMR.